U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

FILE: [redacted] Office: SINGAPORE Date: AUG 09 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(B)(v)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Singapore, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Indonesia who was found to be inadmissible to the United States by a consular officer under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than one year. The applicant married a citizen of the United States in 1999 and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to travel to the United States and reside with his spouse.

The officer in charge determined that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

Counsel has submitted a brief entitled "Motion in Support of Reconsideration of Denial" of the applicant's waiver request. The motion was forwarded by the officer in charge to the Associate Commissioner for consideration as an appeal.

On appeal, counsel states that the applicant's spouse has suffered financially, physically and emotionally due to separation from her husband. In support of the appeal, counsel submits a statement from the applicant's spouse, a list of the couple's expenses, and a letter of support from family friends.

The applicant states that he initially entered the United States as a crew member on November 10, 1996. He remained longer than authorized and filed an application for asylum, which he states was denied in March 2000. There is no evidence in the file as to the specific dates the applicant applied for, or was denied, asylum. In November 1999, the applicant married a United States citizen and on June 10, 2000, he voluntarily departed the United States.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> (9) ALIENS PREVIOUSLY REMOVED.-
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> (B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

* * *

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure from the United States, is inadmissible.

(ii) CONSTRUCTION OF UNLAWFUL PRESENCE.-For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) EXCEPTIONS.-

* * *

> (II) ASYLEES.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

* * *

(v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by

the Attorney General regarding a waiver under this clause.

The issue of inadmissibility is not the purpose of this proceeding. Issues of inadmissibility are to be determined by the consular officer when an alien applies for a visa abroad. This proceeding must be limited to the issue of whether or not the applicant meets the statutory and discretionary requirements necessary for the exclusion ground to be waived. 22 C.F.R. 42.81 contains the necessary procedures for overcoming the refusal of an immigrant visa by a consular officer.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).

In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statue more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground of inadmissibility for unlawful presence after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, Interim Decision 3281 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former

cases involving suspension of deportation. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The record contains a statement from the applicant's spouse indicating that separation from her husband has resulted in the loss of her home and a change in her employment. She also states that because she has asthma and is prone to getting pneumonia, she needs her husband present to care for her when she is ill.

The spouse asserts that she cannot live in Indonesia because her children in the United States need her. In addition, she states that she is unable to relocate to Indonesia to be with her husband because when she was there, she was ill due to unsanitary conditions and frightened due to anti-American sentiment. She also states that she is afraid something will happen to her husband in Indonesia because he is Christian and it is a mostly Muslim country.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie

in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter was already residing in the United States unlawfully when he married his spouse in 1999. He now seeks relief based on that after-acquired equity. However, as previously noted, consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.